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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 San Jose Division

14 FEDERAL TRADE COMMISSION,

15 Plaintiff,

16 v.

17 SWISH MARKETING, INC., a  
18 corporation,

19 MARK BENNING, individually and as an  
20 officer of SWISH MARKETING, INC.,

21 MATTHEW PATTERSON, individually  
and as an officer of SWISH  
22 MARKETING, INC., and

23 JASON STROBER, individually and as  
an officer of SWISH MARKETING,  
24 INC.,

25 Defendants.

Case No. C09-03814 RS

**JOINT CASE MANAGEMENT  
STATEMENT**

Conference Date: April 15, 2010  
Conference Time: 10 a.m.  
Courtroom: 3, 17th Floor

26  
27 Pursuant to Fed. R. Civ. P. 26(f), Civil L.R. 16-9, and this Court's Order dated  
28 November 23, 2009, counsel for the Federal Trade Commission ("FTC") and counsel for

Swish Marketing, Inc. (“Swish”), Mark Benning (“Benning”), Matthew Patterson (“Patterson”), and Jason Strober (“Strober”) (collectively referred to as “the parties”) conferred telephonically on March 8, 2010. The parties hereby jointly submit this Case Management Statement.<sup>1</sup>

**1. Jurisdiction and Service:** This Court has subject matter jurisdiction over this matter pursuant to 15 U.S.C. §§ 45(a), 52, and 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345. No issues exist regarding personal jurisdiction. All Defendants waived service of the summons.

**2. Facts:**

**Plaintiff’s Position:** Between September 2006 to August 2007, Defendants operated websites offering “payday loans” (i.e., short-term, high-interest loans), which failed to adequately disclose to consumers that they would also be charged for a separate financial service – a prepaid debit card, which was sold by another entity, VirtualWorks, LLC (“VirtualWorks”). Plaintiff contends that consumers were unaware that the bank account information they had provided on their loan applications was transferred by Defendants to VirtualWorks, and used to debit consumers’ bank accounts to pay for the debit cards. In particular, the prepaid debit card offer on Defendants’ websites was not clear and prominent. In some cases, Defendants buried the offer among four other offers. If consumers did not affirmatively decline the prepaid card offer, they were charged for the card. See paragraphs 17 to 19 of the Complaint for a more detailed description of those websites. On other websites, Defendants offered to consumers on their payday loan application a “bonus” prepaid debit card. Defendants placed details relating to the card, including its cost, in a disclosure that appeared below the

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<sup>1</sup> On February 22, 2010, the Court dismissed the FTC’s complaint against Benning with leave to amend (Dkt. #60). For simplicity’s sake, however, Swish, Benning, Patterson, and Strober are referred to collectively as “Defendants.” Where a distinction is necessary, Swish, Patterson, and Strober are referred to collectively as “Swish Defendants.”

1 applications' submit button. See paragraphs 20 to 21 of the Complaint for a more  
2 detailed description of those websites.

3 This case also centers on whether the individual defendants are liable for the  
4 corporate defendant's practices at issue. Plaintiff will establish that each of the  
5 individual defendants, as corporate officers of this small, closely held corporation, had  
6 the requisite control over, or participation in, the practices at issue to be held individually  
7 liable for injunctive relief. Plaintiff will also establish that each of the individual  
8 defendants are jointly and severally liable for consumer restitution because they either  
9 participated in the conduct or had sufficient knowledge that, at the very least, they acted  
10 with reckless indifference when they failed to stop the conduct at issue.

11 **Swish Defendants' Position:** The Swish Defendants contend that the prepaid  
12 debit card offer included a statement that "YOU HEREBY AUTHORIZE  
13 EVERPRIVATE CARD to debit your bank account for this one time enrollment fee of  
14 \$54.95." Although this offer was pre-checked "Yes," a substantial number of consumers  
15 changed the "Yes" to a "No," which demonstrates that the prepaid debit card offer, as  
16 maintained by Swish, was not a deceptive act or practice in violation of 15 U.S.C. §  
17 45(a). Moreover, although the websites in question were maintained by Swish, the  
18 design for each of the advertisements in question originated exclusively from  
19 VirtualWorks.

20 The Swish Defendants also deny the Plaintiff's contentions, *supra*, that: (1)  
21 consumers were unaware that the bank account information they had provided on their  
22 loan applications was transferred by Defendants to VirtualWorks, and used to debit  
23 consumers' bank accounts to pay for the debit cards; (2) the prepaid debit card offer on  
24 Defendants' websites was not clear and prominent; (3) Strober and Patterson had the  
25 requisite control over, or participation in, the practices at issue to be held individually  
26 liable for injunctive relief; and (4) Strober and Patterson are jointly and severally liable  
27 for consumer restitution.

**Benning's Position:** "An individual may be held liable under the [FTC Act] for corporate practices if the FTC first can prove the corporate practices were misrepresentations or omissions of a kind usually relied on by reasonably prudent persons and consumer injury resulted." *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7<sup>th</sup> Cir.), *cert. denied*, 493 U.S. 954 (1989) "Once corporate liability is established, the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them." *Id.*, 875 F.2d at 573. "The FTC must then demonstrate that the individual had some knowledge of the practices." *Id.* "[T]hat knowledge requirement may be fulfilled by showing that the individual had 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an avoidance of the truth.'" *Id.*, at 574 (citation omitted).

This standard has not been properly pled in this case. Defendant Mark Benning's motion to dismiss the FTC's Complaint was granted by this Court. (Order, filed February 22, 2010 (Docket No. 60).) No facts have been pled tying Mr. Benning to the alleged wrongdoing, apart from the fact that Mr. Benning was at one time defendant Swish's CEO.

### **3. Legal Issues:**

**Plaintiff's Position:** Legal issues include:

A. Whether the FTC has met its burden of proving that Defendants' websites that are materially similar to the one depicted in Complaint Exhibits A-B were likely to mislead a reasonable consumer in violation of the FTC Act.

B. Whether the FTC has met its burden of proving that Defendants' websites that are materially similar to the one depicted in Complaint Exhibit C were likely to mislead a reasonable consumer in violation of the FTC Act.

C. Whether the FTC has met its burden of proving that Defendant Benning is personally liable for the violations of the FTC Act.

D. Whether the FTC has met its burden of proving that Defendant Patterson is

1 personally liable for the violations of the FTC Act.

2 E. Whether the FTC has met its burden of proving that Defendant Strober is  
3 personally liable for the violations of the FTC Act.

4 F. Whether the Court should order equitable relief in the form of consumer  
5 redress, disgorgement, and restitution.

6 G. Whether the FTC has established a basis for a permanent injunctive relief.

7 **Swish Defendants' Position:** In addition to the legal issues identified by  
8 Plaintiff, legal issues include the following:

9 H. Whether Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. §  
10 53(b) authorizes the award of monetary relief.

11 I. If Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b)  
12 authorizes the award of monetary relief, how the award is to be calculated.

13 J. Whether the Court should order injunctive relief.

14 K. Whether Plaintiff can state a claim against Strober and Patterson upon  
15 which relief may be granted.

16 L. Whether the Defendants have met their burden of proof to establish the  
17 affirmative defenses that will be included in Defendants' answers to the First Amended  
18 Complaint, if such answers are necessary.

19 **Benning's Position:** Legal issues predicate to any determination of liability  
20 against Mr. Benning include whether the corporate defendant Swish is liable for a  
21 violation of the FTC Act, whether Mr. Benning participated directly in the practices or  
22 acts or had authority to control them, and if merely the latter, whether Mr. Benning had  
23 actual knowledge of the alleged wrongdoing. *FTC v. Amy Travel Service, Inc.*, 875 F.2d  
24 at 573.

25 Should liability against Mr. Benning be found, additional legal issues arise  
26 concerning the appropriate remedy, including whether monetary relief is permitted under  
27 the FTC Act (an issue fully briefed by the other defendants and ripe for review by the  
28 Ninth Circuit) and including whether injunctive relief is available against Mr. Benning,

as a *former* corporate officer unlikely to be involved in any recidivist activity. *See, FTC v. Evans Products Co.*, 775 F.2d 1084, 1087 (9<sup>th</sup> Cir. 1985) (FTC cannot obtain an injunction against an individual defendant whose conduct has ceased and is not likely to recur).

**4. Motions:**

**Plaintiff's Position:** Plaintiff anticipates filing a motion for summary judgment.

**Swish Defendants' Position:** The Swish Defendants also anticipate filing a motion for summary judgment. Upon review of the new allegations, if any, made against Strober and Patterson in Plaintiff's First Amended Complaint, these defendants may also make a motion to dismiss on the same grounds raised in Benning's previously-granted Motion (*i.e.*, failure to allege fraud with specificity). If the Court grants the pending Motion to Amend and Certify Opinion for Interlocutory Review, the Swish Defendants may also move for a stay of this action pending appeal. If the Swish Defendants are required to answer the First Amended Complaint, they anticipate that Plaintiff will move to dismiss some or all of the Swish Defendants' affirmative defenses. The Swish Defendants anticipate that there will likely be discovery-related motions filed by Plaintiff and/or the Swish Defendants.

**Benning's Position:** Mr. Benning anticipates a renewed motion to dismiss the anticipated amended complaint and, if necessary, further motions to dismiss further amended pleadings and/or a motion for summary judgment.

**5. Amendment of Pleadings:**

**Plaintiff's Position:** Plaintiff counsel have recommended to their client the FTC that it authorize counsel to file an amended complaint to add Mark Benning as a defendant and to add an unfairness count as to all Defendants by April 5, 2010. Plaintiff proposes a deadline for amending pleadings of one month prior to the close of discovery.

**Swish Defendants' Position:** The Swish Defendants will object to any amendments by Plaintiff that seek to expand the scope of this action to add unfairness or any other new claims on the grounds that such claims would be futile and would not be

1 brought in good faith. The Swish Defendants understand that the deadline for the FTC  
2 to file a First Amended Complaint in this action is April 5, 2010, and will not agree to  
3 extend that deadline. The Swish Defendants do not oppose a deadline for further  
4 amendments to the pleadings up to one month prior to the close of discovery.

5 **Benning's Position:** As mentioned, Mr. Benning anticipates moving to dismiss  
6 the FTC's anticipated amended pleading.

7 **6. Evidence Preservation:**

8 **Plaintiff's Position:** All relevant evidence relating to Defendants has been  
9 preserved. Custodians of relevant evidence received a litigation hold prior to the outset  
10 of litigation, advising them to preserve any materials relating to Defendants. There have  
11 been no ongoing erasures of e-mails, voice mails, and other electronically-recorded  
12 material.

13 **Swish Defendants' Position:** All relevant evidence in the Swish Defendants'  
14 possession, custody or control relating to the claims made in this action has been  
15 preserved. There have been no ongoing erasures of e-mails, voice mails, and other  
16 electronically-recorded material.

17 **Benning's Position:** All relevant evidence has been preserved.

18 **7. Disclosures:** The parties agree to exchange initial disclosures, as required by  
19 Fed. R. Civ. P. 26(a)(1), on or before April 19, 2010.

20 **Plaintiff's Position:** In its initial disclosures, Plaintiff will identify each  
21 individual or entity that Plaintiff contacted during its investigation of Defendants'  
22 practices that has discoverable information that Plaintiff may use to support its claims.  
23 Plaintiff also will provide copies of or identify all documents that Plaintiff obtained from  
24 those individuals or entities and that Plaintiff may use to support its claims. Plaintiff will  
25 disclose that it may use documents that Defendants provided to Plaintiff during its  
26 investigation. Plaintiff will disclose its estimate of consumer injury and state that the  
27 Fed. R. Civ. P. 26(a)(1)(A)(iv) disclosure relating to insurance does not apply to  
28 Plaintiff.

1       **Swish Defendants' Position:** The Swish Defendants will timely provide to all  
 2 other parties the information and/or documentation required pursuant to Fed. R. Civ. P.  
 3 26(a)(1).

4       **Benning's Position:** Mr. Benning will provide initial disclosures in accordance  
 5 with applicable rules by the agreed deadline.

6       **8. Discovery:** Formal discovery began on March 8, 2010.

7       The parties jointly propose to the Court the following discovery plan pursuant to  
 8 Fed. R. Civ. P. 26(f):

9       **Fed. R. Civ. P. 26(f)(3)(A): Initial Disclosures:** Please see Item 7 above.

10       **Fed. R. Civ. P. 26(f)(3)(B): Subjects on which discovery may be needed:** The  
 11 parties intend to conduct discovery on all matters relevant to issues raised by the  
 12 Complaint, Answer, and subsequent pleadings, and all matters otherwise within the  
 13 scope of Fed. R. Civ. P. 26(b)(1).

14       **Plaintiff's Position:** Plaintiff may need to propound discovery on the following  
 15 subjects: Swish's websites that advertised the EverPrivate Card; the transfer and sale of  
 16 consumer information to VirtualWorks; the activation rate for the EverPrivate Card;  
 17 complaints about the EverPrivate Card; the extent to which charges for the EverPrivate  
 18 Card were reversed; the target audience of Swish's websites; the advertising and sale of  
 19 products and services other than the EverPrivate Card that were sold on a Swish website  
 20 with an associated "Yes/No" radio button or that featured disclosures below the "submit"  
 21 button; Benning, Patterson, and Strober's control over, participation in, or awareness of  
 22 the alleged acts and practices; the extent to which Defendants personally or collectively  
 23 profited from the alleged acts or practices; and the extent of consumer injury. In  
 24 connection with determining the appropriateness and terms of any permanent injunction  
 25 that Plaintiff may seek, Plaintiff also may propound discovery related to the seriousness,  
 26 deliberateness, and transferability of Defendants' acts and practices and the likelihood of  
 27 future violations, including discovery on the marketing or sale of other products or  
 28 services on Swish's websites, attempts by Defendants to recoup proceeds from

1 VirtualWorks, and the reasons why Defendants continued to engage in, or stopped  
2 engaging in, the alleged acts or practices.

3 **Swish Defendants' Position:** The Swish Defendants intend to conduct discovery  
4 on the same subjects identified by the Plaintiff, and reserve the right to expand their  
5 scope of discovery should the need arise.

6 **Benning's Position:** Mr. Benning anticipates discovery relating to the FTC's  
7 amended claims for relief and relating to Mr. Benning's defenses thereto.

8 **Fed. R. Civ. P. 26(f)(3)(C): Electronically Stored Information (ESI):** The  
9 parties have not reached an agreement on ESI.

10 **Plaintiff's Position:** Plaintiff seeks an agreement by all parties to maintain all  
11 relevant files in their native format for the duration of the litigation, and, to the extent  
12 ESI is required to be produced, absent other agreement, to produce ESI in its native  
13 format.

14 **Swish Defendants' Position:** The Swish Defendants seek an agreement by all  
15 parties to maintain all relevant files in their native format for the duration of the  
16 litigation. ESI shall be produced in its native format where feasible, and where such  
17 production does not intrude upon the Swish Defendants' privacy rights or evidentiary  
18 privileges. Otherwise, ESI shall be produced on CD-ROM or DVD-ROM.

19 **Benning's Position:** Mr. Benning does **not** agree to produce ESI in native  
20 format. Mr. Benning maintains a Google internet-based Gmail account for both his  
21 personal and business affairs. Accordingly, the FTC's proposal in this regard, in effect  
22 that he turn over his electronic email files in native format, is both unworkable and an  
23 unnecessary intrusion into Mr. Benning's private affairs. Mr. Benning will provide ESI  
24 in CD/DVD format in the form of TIF or PDF document files.

25 **Fed. R. Civ. P. 26(f)(3)(D): Claims of Privilege or of Protection as Trial**  
26 **Preparation Materials:** The parties discussed the best manner for producing privilege  
27 logs and will work together to address any issues relating to assertions of privilege.  
28

**Fed. R. Civ. P. 26(f)(3)(E): Discovery Limitations:** The parties propose the following limitations or modifications of the discovery rules.

A. Interrogatories: None.

B. Duration of Depositions: The time limit imposed by Fed. R. Civ. P. 30(d)(1) for depositions by oral examination shall not include time taken for breaks, such as lunch breaks and off-the-record conversations.

C. Number of Depositions: The parties anticipate taking the depositions by oral examination of the following entities and persons:

- i. Fed. R. Civ. P. 30(b)(6) deposition of the Federal Trade Commission
- ii. Fed. R. Civ. P. 30(b)(6) deposition of Swish
- iii. Patterson
- iv. Benning
- v. Strober
- vi. Michael Hall (former or current Swish employee)
- vii. Gina Han (former or current Swish employee)
- viii. Mikhail Ulinich (former or current Swish employee)
- ix. Gretchen Watters (former or current Swish employee)
- x. VirtualWorks, LLC
- xi. Joshua Finer (officer of VirtualWorks)
- xii. Jerry Klein (officer of VirtualWorks)
- xiii. Giact Systems, Inc. (VirtualWorks' payment processor)
- xiv. PrivaCash.com, Inc. (issuer of a VirtualWorks debit card)
- xv. Secure Cash Network, Inc. (issuer of a VirtualWorks debit card)

**Plaintiff and Swish Defendants' Position:** Plaintiff and the Swish Defendants seek an agreement by all parties that, if taken, these depositions will not count against the limit of 10 depositions by oral examination in Fed. R. Civ. P. 30(a)(2)(A)(I). Plaintiff does not agree that Defendants may depose any individual employee, official, or

agent of the FTC and that such depositions will not be counted against the limit of 10.

**Benning's Position:** Mr. Benning agrees to this proposal if the deposition of the FTC includes any individual employee, official, or agent of the FTC.

D. Other Agreements Regarding Depositions: The parties agree to consult with each other prior to noticing any deposition by oral examination to coordinate the time and place of the deposition. The parties also agree that a party need not separately notice the deposition of a third party already noticed by another party.

E. Expert Witness Discovery: The parties agree that the following types of documents and ESI relating to an expert and other opinion witness (expert witness) and consultant, shall not be subject to discovery:

i. The content of communications between or among:

(1) counsel and an expert witness;

(2) counsel and a consultant;

(3) an expert witness and other expert witnesses or consultants;

(4) an expert witness and his/her staff; and/or

(5) a consultant and his/her staff;

ii. Notes, drafts, written communications, or other types of preliminary work created by, or for, an expert witness; and

iii. Notwithstanding the foregoing, any communications or documents upon which an expert witness specifically relies as a basis for any of his or her opinions or reports shall be discoverable.

F. Other Orders: The parties plan to file a proposed stipulated protective order to protect the personally identifiable and private information of individual(s) and confidential information of the parties from improper disclosure.

**9. Class Actions:** Not applicable.

**10. Related Cases:** This case is related to *Federal Trade Commission v. VirtualWorks, LLC*, Case No. C09-3815 RS (N.D. Cal. filed Aug. 19, 2009). See Related Case Order (Dkt. #14).

1 **11. Relief:**

2 **Plaintiff's Position:** Plaintiff seeks a permanent injunction to prevent future  
3 violations of the FTC Act by Defendants. It also seeks to redress injury to consumers  
4 resulting from Defendants' violations of the FTC Act. At this time, this amount appears  
5 to be between \$6 and \$7 million, and may change with additional discovery. That  
6 amount represents estimated gross sales of the prepaid debit card from Defendants'  
7 websites in 2006 and 2007, less refunds. Plaintiff bases this estimate on information that  
8 Plaintiff obtained from VirtualWorks' payment processor.

9 **Swish Defendants' Position:** The Swish Defendants seek dismissal of the action  
10 and a judgment in their favor.

11 **Benning's Position:** The FTC is not entitled to any injunctive or monetary relief  
12 against Mr. Benning, even if liability against Mr. Benning is found. (*See* Item 3 above.)

13 **12. Settlement and ADR:** The parties have complied with the requirements of ADR  
14 L.R. 3-5, including the filing of the appropriate requests and certifications with the Court  
15 (Dkt. #28–33).

16 At this time, the parties request that the Court refer this matter to a magistrate  
17 judge for settlement purposes. The parties, however, disagree as to when the first  
18 settlement conference should take place.

19 **Plaintiff's Position:** Plaintiff does not believe a settlement conference at this  
20 time is likely to lead to settlement. During the FTC's investigation of Defendants'  
21 practices, the parties engaged in settlement talks over several months. The FTC notified  
22 the parties that the FTC would consider a monetary settlement of less than the full  
23 amount of estimated consumer injury resulting from the challenged practices only upon a  
24 showing of inability to pay that amount, predicated on the submission of sworn financial  
25 statements. Defendants have refused to provide such statements. At this time, Plaintiff's  
26 counsel is not willing to recommend any proposed settlement that does not include the  
27 payment of the full amount of consumer injury absent the submission of such sworn  
28 statements.

1 A settlement conference, however, may be useful once the parties have engaged  
2 in some meaningful discovery. Unless Defendants provide their sworn financial  
3 documents, Plaintiff proposes that a settlement conference not be scheduled prior to  
4 October 2010.

5 Plaintiff counsel do not agree, nor have we advised counsel for Mr. Benning, that  
6 all authority over the conduct of the lawsuit resides with the FTC in Washington, D.C.  
7 However, "full settlement authority" rests only with a majority of the five  
8 Commissioners. To the extent counsel for Mr. Benning is proposing that a majority of  
9 the Commissioners personally attend a settlement conference, such proposal is not  
10 feasible.

11 **Swish Defendants' Position:** At all times before and during this litigation, the  
12 Plaintiff's position has been that it would not consider a monetary settlement of less than  
13 the full amount of the alleged consumer injury (of more than \$6 million) on any basis  
14 other than the Defendants' inability to pay the full amount of the Plaintiff's claims.  
15 Based on this position, the Swish Defendants contend that the Plaintiff has not  
16 negotiated in good faith up to this point, refusing to make or negotiate upon any  
17 reasonable assessment of the Plaintiff's chances of prevailing in this action based on the  
18 disputed legal and factual issues. The Swish Defendants believe that the prompt  
19 scheduling of a settlement conference with a magistrate would assist the parties in  
20 initiating a candid dialogue and evaluation of their respective cases in a genuine effort to  
21 reach a negotiated resolution of this action without further litigation. In addition, the  
22 Swish Defendants believe that, given the substantial amount of pre-lawsuit discovery  
23 that has already been conducted, a settlement conference would be productive at this  
24 juncture. The Swish Defendants do not believe that their respective finances are  
25 germane to settlement, and on that basis are reluctant to provide the government with  
26 their private financial information. The factors that are germane to settlement are: (1)  
27 the likelihood that the Plaintiff will prevail in this action; and (2) the likely amount of  
28 Plaintiff's recovery from the Swish Defendants, if any. The Swish Defendants are

1 prepared to engage in meaningful settlement discussions regarding each of these factors.

2 **Benning's Position:** Mr. Benning believes strongly that an early settlement  
3 conference with a sitting magistrate judge provides the best prospect for resolving this  
4 dispute efficiently and economically.

5 FTC's Bay Area counsel has advised defense counsel that all settlement authority  
6 (indeed all authority over the conduct of the lawsuit) resides with the FTC in  
7 Washington, D.C.; and that the FTC will not entertain *any* settlement discussions unless  
8 and until Mr. Benning provides sworn personal financial documentation.

9 There is no apparent benefit to embarking for several months on idle discovery  
10 against a defendant such as Mr. Benning, against whom so far the FTC has not been able  
11 to plead a proper claim, against whom (as Swish's *former* CEO) no prospective  
12 injunction is allowed, *FTC v. Evans Products Co.*, 775 F.2d at 1087 and against whom  
13 the requested monetary relief cannot be recovered because he lacks the wherewithal to  
14 satisfy even a small fraction of a multi-million dollar award.

15 Accordingly, the immediate intervention of a federal judicial officer is essential to  
16 ensuring that a *bona fide* alternative dispute resolution process is pursued and that the  
17 FTC participates in the process in good faith and *with full settlement authority*. The  
18 initial session may not result in an immediate settlement (then again it may), but at least  
19 it will set the stage for productive subsequent sessions. Mr. Benning has *not* refused to  
20 supply sworn financial documentation; instead he has stated that such information will  
21 be supplied in confidence to a sitting magistrate judge during a *bona fide* settlement  
22 conference at which the FTC is present with full settlement authority.

23 **13. Consent to Magistrate Judge for All Purposes:** The parties do not consent to  
24 have a magistrate judge conduct proceedings, other than for discovery and settlement  
25 purposes.

26 **14. Other References:** The parties do not believe the case is suitable for reference to  
27 binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.  
28

1 **15. Narrowing of Issues:** The parties are not aware of any issues that could be  
2 narrowed by agreement.

3 **16. Expedited Schedule:** The parties do not believe this case can be handled on an  
4 expedited basis.

5 **17. Scheduling:** The parties suggest the schedule below for future proceedings. All  
6 parties are in agreement that responsive pleadings should be due on or before May 10,  
7 2010, and that disclosure of preliminary fact witness lists should be made on or before  
8 September 15, 2010. The parties did not reach agreement on the remaining deadlines.

|   | <b>Plaintiff's<br/>Position</b> | <b>Swish<br/>Defendants'<br/>Position</b> | <b>Benning's<br/>Position</b> |
|---|---------------------------------|---|-------------------------------|
| Responsive pleadings due                            | May 10, 2010                    | May 10, 2010                              | May 10, 2010                  |
| Disclosure of preliminary fact witness list         | September 15, 2010              | September 15, 2010                        | September 15, 2010            |
| Last day to file motions relating to fact discovery | October 25, 2010                | October 25, 2010                          | December 27, 2010             |
| Fact discovery cut-off                              | November 24, 2010               | November 24, 2010                         | January 24, 2011              |
| Expert witness disclosures                          | December 3, 2010                | December 3, 2010                          | February 7, 2011              |
| Rebuttal expert witness disclosures                 | December 31, 2010               | December 31, 2010                         | March 7, 2011                 |
| Expert discovery cut-off                            | January 31, 2011                | January 31, 2011                          | April 11, 2011                |
| Dispositive motions shall be filed by               | February 28, 2011               | February 28, 2011                         | May 2, 2011                   |
| Opp. due  | TBD                             | TBD                                       |                               |
| Reply due   | TBD                             | TBD                                       |                               |
| Hearing no later than                               | TBD                             | TBD                                       |                               |
| Pre-trial conference                                | TBD                             | TBD                                       |                               |
| Trial   | TBD                             | TBD                                       |                               |

1 **18. Trial:** The parties request a bench trial. Plaintiff and Swish Defendants estimate  
2 that the trial will last between eight and ten days; Mr. Benning estimates that the trial  
3 will last between ten and fifteen days.

4 **19. Disclosure of Non-party Interested Entities or Persons:**

5 **Plaintiff's Position:** Civ. L.R. 3-16 does not apply to Plaintiff, as a government  
6 agency.

7 **Swish Defendants' Position:** None.

8 **Benning's Position:** No disclosure.

9 **20. Such other matters as may facilitate the just, speedy, and inexpensive**

10 **disposition of this matter:** Other than as addressed above, the parties are not aware of  
11 any other matters as may facilitate the just, speedy, and inexpensive disposition of this  
12 matter.

13 Respectfully submitted,

14  
15 DATED: March 25, 2010

/s/ Lisa D. Rosenthal

16 \_\_\_\_\_  
17 LISA D. ROSENTHAL  
18 KERRY O'BRIEN  
19 EVAN ROSE  
20 ERIC D. EDMONDSON

Attorneys for Plaintiff  
FEDERAL TRADE COMMISSION

21 (The filer attests that concurrence in the filing of this document has been  
22 obtained from the other signatories.)

23  
24 DATED: March 25, 2010

/s/ Brian M. Grossman

25 \_\_\_\_\_  
26 BRIAN M. GROSSMAN  
27 TESSER & RUTTENBERG

Attorney for Defendants  
SWISH MARKETING, INC.,  
MATTHEW PATTERSON,  
and JASON STROBER

1 DATED: March 25, 2010

/s/ Michel L. Mallow

2 MICHAEL L. MALLOW  
3 MICHAEL A. THURMAN  
4 LOEB & LOEB LLP

5 Attorney for Defendants  
6 SWISH MARKETING, INC., and  
7 MATTHEW PATTERSON

8 DATED: March 25, 2010

/s/ Donald P. Gagliardi

9 DANIEL J. BERGESON  
10 DONALD P. GAGLIARDI  
11 ELIZABETH D. LEAR  
12 BERGESON, LLP

13 Attorney for Defendant  
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